

State Notes

TOPICS OF LEGISLATIVE INTEREST

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Violent Video Games: Danger to Children or Protected Free Speech? **By Patrick Affholter, Legislative Analyst**

In 2005, in response to concerns that violent video games may incite aggressive behavior in children, the Legislature passed and the Governor signed legislation to prohibit the dissemination to minors of “ultra-violent explicit video games” that are harmful to minors. Before the bill’s effective date of December 1, 2005, the United States District Court issued a temporary injunction prohibiting the legislation from taking effect. In March 2006, that Court granted summary judgment in favor of the parties challenging the new law and permanently enjoined Public Act 108 of 2005 as unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This article will describe the 2005 legislation and examine the ruling of the U.S. District Court.

Public Act 108 of 2005

Prohibitions

On September 14, 2005, Governor Jennifer Granholm signed into law Senate Bill 416, which became Public Act 108 of 2005. The Act added Part II (Ultra-Violent Explicit Video Games) to Public Act 33 of 1978, which prohibits disseminating, exhibiting, or displaying sexually explicit matter to minors.

Under Public Act 108, a person may not knowingly disseminate to a minor (a person under 17 years of age) an ultra-violent explicit video game that is harmful to minors. A person who violates that prohibition is responsible for a State civil infraction and subject to a civil fine of up to \$5,000. If the violator has one prior determination of responsibility for that State civil infraction, he or she is subject to a civil fine of up to \$15,000. If the violator has two or more prior determinations of responsibility, the maximum civil fine is \$40,000. In imposing the fine for a third or subsequent violation, the court must consider the scope of the defendant’s commercial activity in disseminating ultra-violent explicit video games to minors.

The dissemination prohibition does not apply to the dissemination of an ultra-violent video game to a minor by any of the following: a parent or guardian who disseminates the game to his or her child or ward; an immediate family member of the minor who disseminates an ultra-violent explicit video game to the minor in the immediate family member’s residence or the minor’s residence; an individual who disseminates an ultra-violent video game to a minor who is a guest in the individual’s residence; or an individual who disseminates an ultra-violent explicit video game for a legitimate medical, scientific, governmental, or judicial purpose.

Public Act 108 also prohibits a person from knowingly making a false representation that he or she is the parent or guardian of a minor, or that a minor is 17 or older, with the intent to facilitate the dissemination to the minor of an ultra-violent explicit video game that is harmful to minors. A violation is a misdemeanor punishable by up to 93 days’ imprisonment, a maximum fine of \$15,000, or both.



In addition, a person who possesses managerial responsibility for a business enterprise renting or selling ultra-violent explicit video games that are harmful to minors may not knowingly permit a minor who is not accompanied by a parent or guardian to play or view the playing of an ultra-violent explicit video game that is harmful to minors. A violation is a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$25,000, or both.

Public Act 108 spells out the conditions under which a person knowingly disseminates an ultra-violent explicit video game to a minor and knows the nature of the video game and the status of the minor. It also includes an affirmative defense to an alleged violation for a person acting in good faith, and outlines the conditions for acting in good faith.

Statutory Definitions

Under the 2005 legislation, "disseminate" means to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to sell, lend, give, exhibit, show, or allow to examine.

"Ultra-violent explicit video game" means a video game that continually and repetitively depicts extreme and loathsome violence. "Extreme and loathsome violence" means real or simulated graphic depictions of physical injuries or physical violence against parties who realistically appear to be human beings, including actions causing death, inflicting cruelty, dismemberment, decapitation, maiming, disfigurement, or other mutilation of body parts, murder, criminal sexual conduct, or torture.

"Harmful to minors" means having the following characteristics:

- Considered as a whole, appeals to the morbid interest in asocial, aggressive behavior of minors as determined by contemporary local community standards.
- Is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
- Considered as a whole, lacks serious literary, artistic, political, educational, or scientific value for minors.

"Morbid interest in asocial, aggressive behavior" means a morbid interest in committing uncontrolled aggression against an individual. In determining whether an ultra-violent explicit video game appeals to this interest, the video game must be judged with reference to average 16-year-old minors. If it appears from the character of the video game that it is designed to appeal to this interest of a particular group of persons, then the video game must be judged with reference to average 16-year-old minors within that particular group.

Legislative Findings

Public Act 108 includes several legislative findings. The Act provides that, in light of Article IV, Section 51 of the State Constitution (which declares that the public health and general welfare of the people of Michigan are matters of primary public concern, and requires the Legislature to pass suitable laws for the protection and promotion of the public health), and "after hearing from expert witnesses and law enforcement officials, considering the testimony



of expert witnesses before other legislative bodies, and reviewing dozens of studies and metastudies of hundreds of studies, the legislature finds all of the following:

- (a) Published research overwhelmingly finds that ultra-violent explicit video games are harmful to minors because minors who play ultra-violent explicit video games are consistently more likely to exhibit violent, asocial, or aggressive behavior and have feelings of aggression.
- (b) Spokespersons for not less than 6 major national health associations have concluded and testified that after reviewing more than 1,000 studies, the studies 'point overwhelmingly to a causal connection between media violence and aggressive behavior in some children', concluding that the effects of media violence on minors 'are measurable and long-lasting'.
- (c) Law enforcement officers testified that recent statewide targeted enforcement efforts reveal that minors are capable of purchasing, and do purchase, ultra-violent explicit video games.
- (d) Law enforcement officers testified about cases of minors acting out ultra-violent explicit video game behaviors by victimizing other citizens.
- (e) The state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors.
- (f) The state has a legitimate and compelling interest in preventing violent, aggressive, and asocial behavior from manifesting itself in minors.
- (g) The state has a legitimate and compelling interest in directly and substantially alleviating the real-life harms perpetrated by minors who play ultra-violent explicit video games."

Entertainment Software Association, et al. v Granholm, et al.

In this case, decided on March 31, 2006, the U.S. District Court for the Eastern District of Michigan ruled Public Act 108 of 2005 unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution and issued a permanent injunction against the Act's enforcement (Case No. 05-73634).

The plaintiffs in the case claimed that Public Act 108 violates the U.S. Constitution's protection of free speech, equal protection, and due process and that it is unconstitutionally vague. The Court granted a preliminary injunction on November 9, 2005, enjoining enforcement of the Act before it was scheduled to take effect. The plaintiffs then filed a motion for summary judgment to invalidate the Act as an unconstitutional violation of free speech under the First and Fourteenth Amendments to the U.S. Constitution. The defendants also moved for summary judgment that the Act did not violate free speech, was not unconstitutionally vague, and was tailored narrowly to promote a compelling State interest.

The Court determined that video games are protected free speech. It opined that the games "contain original artwork, graphics, music, storylines, and characters similar to movies and television shows, both of which are considered protected free speech". While the defendants conceded that the expressive element in video games is fully protected by the First Amendment free speech rights, they argued that "the interactive functional element, which is



not present in other forms of electronic media, can be distinguished and should not be considered protected speech". According to the Court, that argument failed to consider the interactive nature in other forms of entertainment media and "it would be impossible to separate the functional aspects of a video game from the expressive, inasmuch as they are so closely intertwined and dependant on each other in creating the virtual experience".

The Court held that "video games contain creative, expressive free speech, inseparable from their interactive functional elements, and are therefore protected by the First Amendment". Next, the Court had to determine whether Public Act 108 violates the First Amendment. The Court found that video game producers do not intend for the consumers to commit violent actions and the State's research failed to prove that video games ever caused anyone to commit a violent act.

The Court also found that the defendants' reliance on a joint statement of various medical associations that violent video games have a negative impact on minors fell short of "substantial evidence" of the State's compelling interest in protecting minors. The Court said that the position taken in the joint statement by the American Medical Association, the American Pediatric Association, and the American Psychological Association "is not based on any scientific study, but appears to represent the policy or political views of their governing bodies". The Court concluded that "this falls far short of the 'substantial evidence' requirement needed to restrict free speech" and "it cannot be said that the legislature enacted the law using 'reasonable inference' from scientific literature based on 'substantial evidence'."

Further, the Court ruled that the Act does not materially advance the Legislature's stated goals because it "fails to regulate other comparable forms of violent media from minors" and "it appears to discriminate against a disfavored 'newcomer' in the world of entertainment media". In addition, since the Act would make the retailers responsible for the determination of which games were considered "ultra-violent", the Court suggested that retailers would be likely to "steer clear of any game with the potential of such violence in order to avoid criminal liability, thus denying constitutionally protected free speech to minors and adults".

The Court also ruled that Public Act 108 is unconstitutionally vague under the Fourteenth Amendment. It held that the "lack of precision" in the definitions of various terms used in the legislation "will subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers", causing them either to self-censor or otherwise restrict access to video game titles that were potentially offensive. The Court also remarked that game designers likely would make a greater attempt to avoid certain types of games than if the illegal content boundaries were more clearly marked. This behavior, in turn, would deprive access to protected First Amendment expressions by adults, as well as minors.

The Court concluded that Part II, as enacted by Public Act 108, is unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution, and converted the previously ordered preliminary injunction into a permanent injunction.



Responses to the Court Ruling

In the aftermath of the ruling handed down by the U.S. District Court, the Governor expressed disappointment at the outcome of the case and the sponsor of the legislation urged the Governor and Attorney General to appeal the decision.

On the other hand, an April 6, 2006, *Detroit Free Press* editorial urged the Governor not to pursue an appeal or new legislation, but to focus on public education and working voluntarily with retailers toward self-regulation. The editorial characterized Public Act 108 as “a bad idea from the start” and suggested that an appeal or reintroduction of similar legislation would be a waste of time and money. Also, according to an April 5, 2006, *Lansing State Journal* article, Federal courts have struck down video game bans in Washington state, Indianapolis, and St. Louis County, Missouri, because the bans encroached on First Amendment rights (“Senator says ‘science’ backs need to restrict video games”). According to the Department of Attorney General, the State is not appealing the granting of the permanent injunction.

Supporters of restrictions on minors’ access to violent video games, however, continue to claim that scientific research and studies back their contention that the games are dangerous to children and influence aggressive behavior. They also contend that the voluntary rating system used for video games is meaningless because of a lack of enforcement. According to the *Lansing State Journal* article, an undercover survey conducted in April 2005 by the Governor’s Office found that children were able to buy adult-rated video games in nearly half the stores investigated in six Michigan counties.

Meanwhile, controversial violent video games continue to be produced and marketed. In a syndicated column published in the *Detroit Free Press* on June 6, 2006, *Miami Herald* columnist Leonard Pitts Jr. decried a video game created last year called “Super Columbine Massacre RPG”. This game allows players to simulate roaming the hallways of Columbine High School in the roles of Columbine High School killers Dylan Klebold and Eric Harris (“Real-life death makes sick choice for video game”).